1998

Classic Cabinets , INC., A Utah corporation, Plaintiff-Appellee, vs. All American Life Insurance Company, dba Us Life, a New Jersey corporation, Defendant-Appellant : Brief of Appellant

Utah Court of Appeals

Chris L. Schmutz; Attorney for Plaintiff/Appellee.
Gregory M. Simonsen; Merrill F. Nelson; Kirton and McConkie; Attorneys for Defendant/Appellant.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

CLASSIC CABINETS, INC., a Utah corporation, Plaintiff-Appellee, vs. ALL AMERICAN LIFE INSURANCE COMPANY, dba US LIFE, a New Jersey corporation, Defendant-Appellant.	Case No. 980088-CA Priority No. 15

BRIEF OF APPELLANT

Appeal from a Final Judgment of the Third District Court of Salt Lake County
State of Utah
Judge Frank G. Noel

Chris L. Schmutz
265 East 100 South, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 364-0256

Attorney for Plaintiff-Appellee

Gregory M. Simonsen (A4669)
Merrill F. Nelson (A3841)
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, Utah 84111-1004
Telephone: (801) 328-3600

Attorneys for Defendant-Appellant

IN THE COURT OF APPEALS OF THE STATE OF UTAH

CLASSIC CABINETS, INC., a Utah corporation, Plaintiff-Appellee, vs. ALL AMERICAN LIFE INSURANCE COMPANY, dba US LIFE, a New Jersey corporation, Defendant-Appellant.	:	Case No. 980088-CA Priority No. 15

BRIEF OF APPELLANT

Appeal from a Final Judgment of the Third District Court of Salt Lake County
State of Utah
Judge Frank G. Noel

Chris L. Schmutz
265 East 100 South, Suite 300
Salt Lake City, UT 84111
Telephone: (801) 364-0256

Attorney for Plaintiff-Appellee

Gregory M. Simonsen (A4669)
Merrill F. Nelson (A3841)
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, Utah 84111-1004
Telephone: (801) 328-3600

Attorneys for Defendant-Appellant

PARTIES TO THE PROCEEDING IN THE DISTRICT COURT

Plaintiff-Appellee: Classic Cabinets, Inc., a Utah corporation;

Defendant-Appellant: All American Life Insurance Company, dba US Life, a New Jersey corporation;

Other defendants: Midland National Life Insurance Co., a joint stock corporation; Liberty Life Insurance Co., a South Carolina corporation; Leon J. Munyan and Kathy L. Munyan, dba Munyan & Associates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Rules

STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to U.C.A. § 78-2a-3(2)(j).

STATEMENT OF ISSUES PRESENTED

1. Whether the district court erred in refusing to set aside the default judgment for lack of service, resulting in lack of jurisdiction and a void judgment.

Standard of Review: Correction of error. *Bonneville Billing v. Whatley*, 949 P.2d 768, 771 (Utah App. 1997). This issue was raised in the motion to set aside the default judgment. (R. 105, 203-06.)

2. Whether the district court abused its discretion in refusing to set aside the default judgment on equitable grounds justifying relief.

Standard of Review: Abuse of discretion. *Birch v. Birch*, 771 P.2d 1114 (Utah App. 1989). This issue was raised in the motion to set aside the default judgment. (R. 106, 208-11.)

3. Whether the district court erred in ruling that the motion to set aside the default judgment was untimely.

Standard of Review: Correction of error. *Bonneville Billing v. Whatley*, 949 P.2d 768, 771 (Utah App. 1997); *Workman v. Nagle Construction, Inc.*, 802 P.2d 749, 752 (Utah App. 1990). This issue was raised in the motion to set aside the default judgment. (R. 106, 207.)

4. Whether the district court erred in ruling that All American has no meritorious defense to the action.

Standard of Review: Correction of error. *Erickson v. Schenkers International Forwarders, Inc.*, 882 P.2d 1147, 1148 (Utah 1994). This issue was raised in the motion to set aside the default judgment. (R. 107, 211.)

5. Whether the district court erred in awarding attorney fees to plaintiff without a showing of any legal basis for recovery of fees.

Standard of Review: Correction of error. *Valcarce v. Fitzgerald*, 331 U.A.R. 68, 72 (Utah 1997). This issue was raised generally by the motion to set aside the default judgment, challenging all elements of that judgment, and specifically under "any other reason justifying relief." (R. 98-109.)

DETERMINATIVE LEGAL PROVISIONS

Relief from the default judgment is based on Rule 60(b), Utah R. Civ. P., set forth verbatim in the Addendum. (Add. 10.)[1]

STATEMENT OF THE CASE

This is an action for refund of life insurance premiums under a claimed ten-day return privilege. The policies were sold by defendant Munyan & Associates and issued by defendants All American Life, Midland National Life, and Liberty Life. Plaintiff alleged that the claims were timely because the policies were supposedly never delivered.

---

[1] Since entry of the order denying relief from the default judgment, Rule 60(b) has been amended to delete ground (4), referring to the defendant's nonappearance for lack of personal service. (Add. 12.) That ground was considered "ambiguous" and, in any event, is fairly comprehended within the former ground (5), now listed as (4), referring to a judgment that is void. Rule 60(b), Advisory Committee Note (Add. 11); *see Garcia v. Garcia*, 712 P.2d 288, 290-91 (Utah 1986) (discussing both grounds in context of defective service). Amendments to procedural rules are presumed to apply retroactively, even to cases pending on appeal. *E.g., Long v. Simmons*, 77 F.3d 878, 879 (5th Cir. 1996); *see* Rule 1(b), Utah R. Civ. P; Rule 86, Fed. R. Civ. P. Accordingly, the amended version of Rule 60(b) applies to this appeal.

(R. 1-5.) Plaintiff claims to have served All American by delivering a copy of the summons and complaint on CT Corp., All American's agent for service of process. (R. 24, 34.) When All American did not answer the complaint, plaintiff took a default judgment in the amount of $92,219. (R. 34, 41, Add. 4.)

However, CT Corp. was not served with process for All American; consequently, All American was never notified of the action. (R. 142-44). Moreover, plaintiff waited for eighteen months to notify All American of the default judgment, at which time plaintiff's counsel simply telephoned All American and demanded payment. (R. 112-14, 178.) Within sixty days, All American filed a motion to set aside the default judgment, demonstrating that it was not served with process and that, in any event, plaintiff had no grounds for a ten-day refund because the policies were in fact delivered over *two years* before the refund request. (R. 98, 112, 117-37.)

The district court denied the motion to set aside, concluding that All American was properly served, that its motion was untimely, and that the underlying merits and equities did not justify relief. (R. 229, Add. 1; R. 148-61.) All American appeals from that order, which was certified for immediate appeal under Rule 54(b). (R. 230, Add. 2.) The court stayed enforcement of the order pending appeal. (R. 244, Add. 8.) [2]

---

[2] All claims against the other defendants are resolved or unrelated. After obtaining the default judgment against All American, plaintiff stipulated to dismissal of all claims against Midland and Liberty. (R. 71 and 87.) The claims against Munyan & Associates pertain to their alleged fraud in selling the policies and have no relation to the issues on this appeal. Those claims remain pending following denial of Munyans' motion to dismiss. (R. 5, 217.)

STATEMENT OF FACTS

Beginning in 1991, plaintiff contracted with Munyan & Associates, independent management consultants ("Munyans"), to procure life insurance policies on plaintiff's employees. The policies were issued by All American Life Insurance Company, Midland National Life Insurance Co., and Liberty Life Insurance Co. Plaintiff's employees signed receipts acknowledging delivery of the All American policies between July 1991 and October 1993. (Complaint, ¶ 10, Exh. A, R. 3, 11-12; Affidavit of J.W. Dewbre, ¶¶ 5-6, Exh. A, R. 112, 117-37.)

In a letter to All American, dated June 9, 1994, plaintiff requested a refund of all policy premiums under the "10 day free look" provision, which allows the policyholder the right to return the policy for any reason "within ten days after its delivery." *See* U.C.A. § 31A-22-423. This letter alleged various fraudulent activities by the Munyans, but conceded, "We are confident these activities were neither condoned nor sanctioned by US Life [All American]." (Complaint, Exh. B, R. 13.) On July 13, 1994, All American responded to plaintiff, explaining that the ten-day return period had long since expired, precluding any right to a premium refund. However, the response letter requested additional information in order to investigate the alleged misconduct by the Munyans. (Dewbre Aff't, ¶¶ 9-12, Exh. C, R. 113, 140.) Having received no further information from plaintiff by September 1, 1994, All American wrote once more to plaintiff, believing the matter was concluded: "We assume all of these issues have been resolved since we have not received this documentation." (*Id.*, ¶¶ 13-14, Exh. D, R. 113-

14, 141.) While plaintiff claims to have sent a subsequent request for copies of the signed statements showing delivery of the policies (R. 180), the record contains no further correspondence between the parties (Dewbre Aff't, ¶ 15, R. 114).

Over one year later, in January 1996, plaintiff filed the complaint in this action, seeking refund of the policy premiums. (R. 1.) Plaintiff claims to have served All American through delivery of the summons and complaint by a constable to CT Corporation System, All American's designated agent for service of process. (Affidavit of Chris L. Schmutz, ¶¶ 7-8, R. 177.) However, by some error or oversight, not yet fully explained, the intended summons and complaint never reached CT Corp. Plaintiff intended that the process papers for *both* All American *and* defendant Liberty Life were to be served at the same time, by the same constable, on the same service agent, CT Corp. (*id.*), but CT Corp. received only the summons and complaint for Liberty Life; it did not receive papers for All American. (Affidavit of Sandy Streeper, ¶¶ 3-8, R. 143-44.) Whether the constable misplaced or failed to deliver the summons and complaint directed to All American, or erroneously believed the All American papers were clipped to the Liberty Life papers when they were not, or clipped the All American papers underneath those for Liberty Life, without specifying that there were two sets of process for two different defendants, is unknown. Whatever happened, CT Corp. has no record of receiving a summons and complaint for All American, and All American consequently

received no notice of this action. (Streeper Aff't, ¶ 9, R. 144; Dewbre Aff't, ¶¶16-18, R. 114.) [3]

When All American did not answer the complaint, plaintiff promptly took a default judgment, without making any further effort to contact All American or verify its notice of the action. (R. 33-42.) The judgment, dated February 27, 1996, is for $92,219, which includes the full amount of premiums paid to All American, plus prejudgment interest, costs, and attorney fees. (R. 41, Add. 4.)

Plaintiff failed to send notice of the default judgment to All American, even though plaintiff and its counsel had corresponded with All American prior to the action and, therefore, knew precisely how to contact All American again, if they had desired. Instead, plaintiff sent notice of the default judgment addressed to Michelle Rehrman at CT Corp., All American's agent *only for service of process.* (Schmutz Aff't, ¶ 9, R. 177, 193.) Because the envelope containing the notice of default judgment and the notice itself were not addressed to any particular corporation or defendant, CT Corp. did not know which party was to receive the document; accordingly, CT Corp. returned the

---

[3] The constable claims that he served both sets of process on Michelle Rehrman, a CT Corp. employee, with the All American summons on top, citing as proof *his entry* of her name "*on the return copy*" of the summons, the copy he filed in the court. (Affidavit of Silvan D. Warnick, ¶¶ 12-13, R. 166-67, emp. added.) However, entry of the employee's name on the *return copy* of a summons can be made at any time prior to filing and does not prove that a separate copy of the summons was actually served, or that the documents actually served were in any particular order. The constable states that his "practice" is to stamp the summons and write in the date and time of service and the name of the person served (*id.*, ¶ 12, R. 166), but he obviously deviated from that practice by omitting the date and time of service from the All American summons (R. 22), and leaving the stamp on the Liberty Life summons entirely blank (R. 16). The constable also failed to document the time of service on the affidavit of service for either defendant, as required by U.C.A. § 78-12a-2(3). (R. 18, 24.) Given these lapses and inconsistencies, it is evident that the constable did not adhere to either legal or usual practice in the service of process in this case, creating the likelihood that CT Corp. did not receive the All American summons, and that Rehrman's name was written on the return copy of the summons only as an afterthought.

notice to plaintiff's counsel for identifying information. (Streeper Aff't, ¶¶ 10-11, R. 144, 147, 192.) Plaintiff's counsel never supplied the requested information; consequently, All American never received the notice of default judgment. (*Id.*, ¶ 12, R. 144; Schmutz Aff't, ¶¶ 10-11, R. 177-78; Dewbre Aff't, ¶¶ 16-18, R. 114.)

On July 7, 1997, over sixteen months after obtaining the default judgment, plaintiff's counsel telephoned J.W. Dewbre, All American's vice president and general counsel in Dallas, Texas, regarding payment of the default judgment. Mr. Dewbre responded that he knew nothing of any such judgment, but would investigate and respond. The next day, local counsel for All American contacted plaintiff's counsel for information, which was supplied. (Schmutz Aff't, ¶ 13, R. 178-79; Dewbre Aff't, ¶¶ 16-17, R. 114.)

Within two months after learning of the default judgment, All American filed a motion to set aside the judgment. (R. 98.) All American argued under Rule 60(b) that service of process was lacking or improper; that All American failed to respond through no fault of its own; that it had a valid defense to plaintiff's refund claim; and that enforcing a default judgment of this high amount, including unfounded attorney fees, was unjust under the circumstances. (R. 101-09, 199-212.) The district court rejected those arguments, accepting plaintiff's arguments that service was proper, that the motion was untimely, and that there was no other reason justifying relief. (R. 229-30, Add. 1-3; R. 148-63.) As indicated above, the order denying relief from the default judgment was certified for immediate appeal (R. 230), and All American commenced this appeal (R.

232). The order is stayed pending appeal. (R. 244, Add. 8.) The Utah Supreme Court subsequently transferred the case to this Court.

SUMMARY OF ARGUMENT

Utah courts have traditionally been liberal in setting aside default judgments in the interest of permitting disputes to be decided on the merits, especially when there is reasonable justification for the defendant's nonappearance. To allow a plaintiff to retain a judgment obtained without actual notice or a hearing, particularly when efforts to prevent knowledge of the judgment appear intentional, is "harsh and oppressive."

All American is entitled to relief from the default judgment under Rule 60(b)(4) because the judgment is void for lack of notice and lack of jurisdiction. Plaintiff failed to serve CT Corp., All American's agent for service of process; moreover, it is undisputed that All American received no actual notice of the action. Because service was defective, the district court lacked jurisdiction, and its judgment is consequently void.

All American is entitled to relief from the default judgment under Rule 60(b)(6) on grounds of equity and justice. All American has no culpability in this action, having received no actual notice of the action or the default judgment. All American's service agent also denies receiving notice of this action. If All American had known of the action, it would have successfully defended the action and plaintiff would have recovered no judgment against All American. By contrast, plaintiff failed to notify All American of either the action or the default judgment, even though plaintiff knew All

American's address and could have made contact if desired, as evidenced by the ease with which plaintiff subsequently made demand for payment. Absent relief from the judgment, plaintiff will retain an unfair windfall, being entitled to no recovery on the merits of its claims.

All American's motion for relief is timely because the time limits in Rule 60(b) do not apply to a judgment that is void. Moreover, the request for relief under 60(b)(6) is timely because it was filed within a reasonable time. All American filed its motion within two months after learning of the judgment. The expiration of eighteen months between the judgment and the motion for relief is attributable to plaintiff's failure to give notice of the judgment as required by law.

All American has a meritorious defense to plaintiff's claims, which are based on the erroneous assumption that the All American policies were never delivered. All American has presented unrefuted evidence that its policies were delivered over two years before this action was filed. Moreover, All American has no liability for the separate claims against the Munyons.

Finally, plaintiff's attorney fee award must be reversed because plaintiff has identified no contractual or statutory basis for recovery of attorney fees.

ARGUMENT

Utah cases uniformly adhere to the principle that default judgments are disfavored in the law because they deny access to courts for just resolution of disputes. Accordingly, default judgments should be liberally set aside when the moving party is

not at fault and justice demands relief. These principles are plainly set forth in *Interstate Excavating, Inc. v. AGLA Development Corp.*, 611 P.2d 369, 371 (Utah 1980), reversing a default judgment based on disputed notice:

> [D]efault judgments . . . are not favored in the law. . . . Speaking generally about such problems, it is to be kept in mind that access to the courts for the protection of rights and the settlement of disputes is one of the most important factors in the maintenance of a peaceable and well-ordered society. . . .
>
> . . . .
>
> The uniformly acknowledged policy of the law is to accord litigants the opportunity for a hearing on the merits, where that can be done without serious injustice to the other party. To that end, the courts are generally indulgent toward the setting aside of default judgments where there is a reasonable justification or excuse for the defendant's failure to appear, and where timely application is made to set it aside. Consistent with the objective just stated, where there is doubt about whether a default should be set aside, the doubt should be resolved in favor of doing so, to the end that each party may have an opportunity to present his side of the controversy and that there be a resolution in accordance with law and justice.

See also Erickson v. Schenkers International Forwarders, Inc., 882 P.2d 1147, 1149 (Utah 1994) (vacating default judgment: "Generally, courts should be liberal in granting relief against default judgments so that cases may be tried on the merits."); *Katz v. Pierce*, 732 P.2d 92, 93 (Utah 1986) (court should be indulgent in setting aside default judgment, and doubt should be resolved in favor of relief); *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contr., Inc.*, 544 P.2d 876, 879 (Utah 1975) (courts favor relief from default judgments because "the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them"); *Mayhew v. Standard Gilsonite Co.*, 376 P.2d 951, 952 (Utah 1962) ("To clamp a judgment rigidly

and irrevocably on a party without a hearing is obviously a harsh and oppressive thing."); 12 Moore's Federal Practice § 60.22[3][a]-[b] (1998).[4]

Ordinarily, the standard of review for relief from a default judgment is abuse of discretion; however, when the asserted basis for relief is lack of jurisdiction, resulting from defective service and lack of notice, the district court has no discretion, and entitlement to relief becomes a question of law. Accordingly, the standard of review in this case is correction of error, and no deference is owed to the district court. *See Bonneville Billing v. Whatley*, 949 P.2d 768, 771 (Utah App. 1997); *Workman v. Nagle Constr., Inc.*, 802 P.2d 749, 754 n.11 (Utah App. 1990).

Relief from default judgments is authorized by Rule 55(c), Utah R. Civ. P., which provides that "a judgment by default" may be set aside "in accordance with Rule 60(b)." Rule 60(b) states that "the court may in the furtherance of justice relieve a party . . . from a final judgment" for any of the stated reasons. (Add. 10.) Applying this rule to default judgments, the Utah Supreme Court has developed a three-part analysis for relief. As set forth in *State v. Musselman*, 667 P.2d 1053, 1055-56 (Utah 1983), a defendant seeking relief from a default judgment must show that (1) at least one of the grounds for relief in Rule 60(b) applies; (2) the motion for relief is timely; and (3) the movant has a meritorious defense to the action. *See also Erickson v. Schenkers International*

---

[4] Because a default judgment denies access to the court, such judgment implicates the open courts provision of the Utah Constitution, Art. I, Sec. 11, which not only guarantees that "every person . . . shall have a remedy" for injury done to him, but that "no person shall be barred from . . . *defending* before any tribunal in this State . . . any civil cause to which he is a party." (Emp. added.) Barring a defendant from contesting claims filed without notice is equally unconstitutional as barring a plaintiff from suing on a claim before it is known. *See, e.g., Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1986) (striking down statute of repose under open courts provision).

Forwarders, Inc., supra, 882 P.2d at 1148; *Wood v. Weenig*, 736 P.2d 1053, 1054 (Utah App. 1987). Those conditions for relief from a default judgment are satisfied in the present case.

POINT I: ALL AMERICAN IS ENTITLED TO RELIEF FROM THE DEFAULT JUDGMENT UNDER RULES 60(b)(4) AND (6).

Rule 60(b), grounds (4) and (6), provide for relief as follows:

> On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party . . . from a final judgment . . . for the following reasons: . . . (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment. [Add. 10.]

Either reason for relief applies under the facts of this case, where service of process is lacking.

A. Relief Under Rule 60(b)(4).

A default judgment entered without service of process is void for lack of jurisdiction. For example, in *Garcia v. Garcia*, 712 P.2d 288 (Utah 1986), the plaintiff filed a divorce complaint and purported to serve the defendant, who was in prison, by delivering a copy of the summons and complaint to the prison personnel office. A default divorce decree was later entered. The defendant denied receiving the papers and sought to set aside the default decree ten years after it was entered. The court granted relief, reasoning that because service was defective, "the court was without jurisdiction to enter the original decree of divorce." *Id.* at 290. After discussing both former 60(b)(4) and (5), the court concluded that "because of the ineffective service of process . . . the decree is void for lack of jurisdiction." *Id.* at 291.

This Court recently followed the same analysis in *Bonneville Billing v. Whatley*, 949 P.2d 768 (Utah App. 1997). There, the plaintiff sued to collect a debt. Unable to accomplish personal service, the plaintiff's attorney filed a false affidavit to support service by mail and obtained a default judgment. Over three years later, the defendant learned of the judgment and sought to set it aside, denying that he was served either personally or by mail. This Court granted relief under former 60(b)(5), the voidness provision, reasoning that "whether service of process was proper is a jurisdictional issue," reviewed for correctness. *Id.* at 771. "[I]f jurisdiction is lacking, the judgment cannot stand without denying due process to the one against whom it runs." *Id.* (citation omitted). A judgment entered without jurisdiction is "void" and "must be set aside." *Id.* *See also Workman v. Nagle Constr., Inc.*, 802 P.2d 749, 753-54 (Utah App. 1990) (default judgment set aside as void for lack of notice to defendants); *Skanchy v. Calcados Ortope SA*, 952 P.2d 1071, 1074 (Utah 1998) (default judgment based on invalid service is void); 12 Moore's Federal Practice, *supra*, § 60.44[3].

Similarly, the default judgment entered in the present case is void for lack of jurisdiction because All American did not receive proper service of process. Plaintiff claims that it served All American by requesting a constable to deliver the summons and complaint to CT Corp., All American's service agent. However, the only evidence of service is the *return copy* of the summons on which *the constable* wrote the name of a CT Corp. employee with whom he was familiar. The return copy of the summons shows no date or time of service, and the affidavit of service fails to document the time of

service, as required by law. (*See* note 3, *supra.*) By contrast, CT Corp., whose business is to receive service for nonresident corporations, denies receiving service for All American. Moreover, All American indisputably received no *actual* notice of the action. In the course of attempting to serve two defendants at the same time, it is likely that plaintiff or the constable omitted or misplaced the All American summons and believed that it was served, when in fact it was not. Accordingly, the district court lacked jurisdiction to enter the default judgment, and the judgment must be set aside as void.[5]

B. Relief Under Rule 60(b)(6).

As noted above, Rule 60(b)(6) allows relief from a default judgment for "any other reason justifying relief from the operation of the judgment." This is described as a "catch-all" provision for relief, covering all possible grounds not enumerated previously in the Rule. This provision is a "grand reservoir of equitable power to do justice in a particular case." 12 Moore's Federal Practice, *supra*, § 60.48[1] (citations omitted). It "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Id.* (citations omitted). For example, this catch-all provision may apply to grant relief from a judgment entered without proper

---

[5] At the very least, because of the dispute in evidence over service of process, this Court should vacate the judgment and remand the case for an evidentiary hearing on sufficiency of notice. In addressing a motion for relief from a default judgment, a trial court should not resolve factual disputes related to service of process without an evidentiary hearing. *See Davis v. Musler*, 713 F.2d 907, 913-15 (2nd Cir. 1983) (conflicting affidavits from process server and defendants "raised sufficiently serious questions of fact to warrant an evidentiary hearing"); *United States v. Baus*, 834 F.2d 1114, 1122-25 (1st Cir. 1987); 12 Moore's Federal Practice, *supra*, § 60.44[4]. This course is consistent with the policy of resolving doubts in favor of relief from the default judgment. *E.g., Interstate Excavating, Inc. v. AGLA Development Corp.*, 611 P.2d 369, 371 (Utah 1980) (court improperly denied relief from default judgment without evidentiary hearing to resolve factual dispute regarding notice).

notice of the proceedings, in violation of due process. *See Bish's Sheet Metal Co. v. Luras*, 359 P.2d 21, 22 (Utah 1961).

Under Utah law, whenever the facts present a conflict, uncertainty, or confusion regarding proper service of process and notice of the action, the courts exercise their equitable power under Rule 60(b) to grant relief from the default judgment. For example, in *May v. Thompson*, 677 P.2d 1109 (Utah 1984), an assault action, the plaintiff engaged in settlement negotiations with defendant's insurance adjuster before filing suit. *Id.* Defendant was served with a summons indicating that a copy of the complaint was available from the court clerk; however, the plaintiff later filed a second return of service indicating that a copy of the complaint accompanied the summons. Following entry of default judgment, the defendant sought relief, denying receipt of the complaint or notice of the default hearing. Neither had the plaintiff attempted to contact the adjuster with whom he had previously negotiated. The court granted relief under Rule 60(b), noting that "the contradictions engendered in the service of process, . . . inconsistent returns, efforts to reach a prelitigation settlement, [and] the immediacy in seeking relief . . . all suggest justice in granting relief from a default." *Id.* at 1110. If "default would not have occurred" but for the confusion over proper notice, "the ends of justice require an opportunity for the defendant to have his day in court." *Id.* The court also observed that where the parties had been engaged in negotiations prior to commencement of the action, "courtesy and equity required" the plaintiff to advise defendant of his intent to pursue

legal action. *Id.* at 1110-11. Under all the circumstances, "equity and good conscience" justified relief from the default judgment. *Id.* at 1111.

Several similar cases illustrate this judicial readiness to set aside default judgments when there is confusion and conflict over proper notice. In *Woody v. Rhodes*, 461 P.2d 465 (Utah 1969), the sheriff served one defendant, but the summons actually named another defendant. Because the defendant served may have been mislead, the default judgment against him was set aside under Rule 60(b). *Id.* at 466. In *Locke v. Peterson*, 285 P.2d 1111 (Utah 1955), the summons served on the defendant was not a true copy of the summons filed with the court, creating uncertainty regarding filing and service of the complaint. The court granted relief from the default judgment:

> This situation created sufficient confusion that the motion to set aside . . . should have been granted . . . consistent with our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits. [*Id.* at 1113.]

See also Interstate Excavating, Inc. v. AGLA Development Corp., 611 P.2d 369, 370-71 (Utah 1980) (vacated default judgment because of factual dispute over notice of trial date); *Security Adjustment Bureau, Inc. v. West*, 437 P.2d 214, 215-16 (Utah 1968) (vacated default judgment because of "confusion" regarding notice, available defense to the action, and "spirit of the rules" entitling defendant "to his day in court").

The foregoing authorities compel equitable relief from the default judgment in this case. The parties engaged in prelitigation correspondence in an effort to resolve the claims amicably. In fact, after a long period of silence from plaintiff, All American wrote to plaintiff in September 1994 expressing the belief that "all of these issues have

been resolved." (R. 141.) Over sixteen months later, plaintiff commenced this action, without extending All American the courtesy of notice regarding plaintiff's intent to seek a judgment. *See May v. Thompson, supra*, at 1110-11. Plaintiff then obtained a default judgment and waited another sixteen months before notifying All American of that judgment. When plaintiff *wanted* to contact All American, for the purpose of collecting the judgment, it did so with little effort. Upon learning of the judgment, All American promptly sought relief by showing the absence of notice, the suspicion and confusion surrounding alleged service of process, and the failure to give notice of the default judgment. Plaintiff's entire course of action appears carefully calculated to conceal the litigation and judgment from All American until the time limits in 60(b) had passed and relief from the judgment appeared unlikely. Moreover, this course was followed with full knowledge of All American's absolute defense to the refund claims. Not only would default not have occurred with proper notice, but plaintiff would have recovered nothing on its claims. *See id.* at 1110; Dewbre Aff't, ¶¶ 11, 19, R. 113-14. Accordingly, if relief is denied, plaintiff recovers an unjust windfall.

In summary, All American is not at fault, and vacating the judgment results in no unfair prejudice to plaintiff. These facts, taken in the aggregate, require this Court, in "equity and good conscience," to vacate the default judgment and allow All American its day in court. Relief here is necessary "to accomplish justice."

POINT II: ALL AMERICAN'S MOTION FOR RELIEF IS TIMELY.

A. Rule 60(b) Time Limits Do Not Apply.

Under Rule 60(b), a motion for relief under grounds (4) and (6) "shall be made within a reasonable time." (Add. 10.) However, even this reasonable-time standard has no application to a judgment that is void for lack of jurisdiction, based on defective service of process:

> There is only one exception to this [reasonable-time] rule, and that applies to judgments that are totally void. . . . [T]here is and can be no time limit on judicial relief from a judgment that is, in fact, already a nullity and always subject to direct and collateral attack. Anytime is a "reasonable" time to set aside a void judgment. [12 Moore's Federal Practice, *supra*, § 60.65[1], citations omitted.]

Utah courts follow this exception in granting relief from judgments that are void for lack of service. For example, in *Garcia v. Garcia*, 712 P.2d 288 (Utah 1986), discussed above, the plaintiff claimed to have served the incarcerated defendant through delivery of process to the prison personnel office. Ten years after the default judgment was entered, the defendant moved to set it aside on the grounds of defective service. The court granted relief, holding that the motion was timely, regardless of whether it was filed within a reasonable time:

> [W]here the judgment is void because of a fatally defective service of process, the time limitations of Rule 60(b) have no application. [*Id.* at 290.]

Similarly, in *Woody v. Rhodes*, 461 P.2d 465 (Utah 1969), discussed above, the court granted relief from a default judgment one year after it was entered, based on invalid service of process. Regarding timeliness of the motion, the court held, "The three-

months provision provided for in Rule 60(b) has no application to this situation." *Id.* at 466. *See also Bonneville Billing v. Whatley, supra*, 949 P.2d at 771 n.2 (granting relief from default judgment after three years because "the time limitations of Rule 60(b) have no application" to a void judgment).

As demonstrated above, the default judgment in the present case is void for lack of jurisdiction, based on lack of service and notice to All American. Therefore, the time limits of Rule 60(b) do not apply, and the judgment should be set aside.

B. All American Sought Relief Within A Reasonable Time.

Even if the reasonable-time standard is applied to the requested relief under Rule 60(b)(6), the equitable catch-all provision, that standard is met under the circumstances of this case. *See generally* 12 Moore's Federal Practice, *supra*, § 60.65[1] (what time is "reasonable" is not a fixed concept, but "depends on the facts and circumstances of each case," citing cases in which relief was granted after several years). *See also Ney v. Harrison*, 299 P.2d 1114 (Utah 1956) (granting relief from default judgment eleven months after entry because defendant believed her ex-husband was responsible for the claim). Here, All American challenged the default judgment within two months after learning of it. The passage of eighteen months from entry of the judgment is attributable entirely to the plaintiff's own failure and delay in notifying All American of the judgment.

Rule 55(a)(2), Utah R. Civ. P., requires notice to the party in default, as provided in Rule 58A(d). Rule 58A(d) requires that a copy of the signed judgment be served as

provided in Rule 5. Rule 5(b)(1) requires that service of a judgment on a party be accomplished by delivering or mailing the judgment to the last known address of the *party or the party's attorney*. As applied by this Court in *Workman v. Nagle Constr., Inc.*, 802 P.2d 749 (Utah App. 1990), failure to give the notice required by Rule 58A(d) does not invalidate the judgment, but noncompliance "is a weighty factor in determining the timeliness of later challenges to the judgment under Utah R. Civ. P. 60(b)(5) through (7)." *Id.* at 751. Specifically, "if a losing party has remained ignorant of a judgment in part because the prevailing party has not complied with Rule 58A(d), the resulting delay is more reasonable for purposes of Rule 60(b)(5)-(7)." *Id.* In *Workman*, a delay of fifteen months in seeking relief from the default judgment was considered reasonable because the defendant's "ignorance of the judgment until that time was due in part to a lack of notice that the plaintiff was required to provide." *Id.* at 752.

Under the foregoing authorities, All American sought relief within a reasonable time because the delay of eighteen months from entry of the default judgment to filing of the motion to set aside was due to plaintiff's failure to provide notice of the judgment in compliance with Rule 58A(d). Plaintiff claims to have complied with the rule by sending notice of the judgment to an employee at CT Corp., but the notice failed to specify which defendant was to receive it. Consequently, CT Corp. returned the notice to plaintiff for further information, and plaintiff failed to take any further action. Under the rules set forth above, plaintiff was required to serve All American, not by mailing a copy to CT Corp., the agent for service of process, but by delivering or mailing a copy to All

American at its last known address. Plaintiff plainly knew All American's address through the exchange of correspondence prior to filing the action. Moreover, plaintiff had no difficulty contacting All American for purposes of *collecting* the judgment. Given the ease with which plaintiff could have notified All American of the judgment, its failure to do so can only be regarded as intentional, for the purpose of concealing the judgment until the time periods in Rule 60(b) had elapsed and relief from the judgment became more difficult. Under these facts, the timing of All American's efforts at relief must be considered reasonable, and plaintiff should be estopped to assert that the motion is untimely. *See Central Bank & Trust Co. v. Jensen*, 656 P.2d 1009, 1012 (Utah 1982) (plaintiff may be estopped from asserting time bar where its own conduct, ostensibly to allow the 60(b) time limits to expire, caused the defendant's delay in seeking relief).

POINT III: ALL AMERICAN HAS A MERITORIOUS DEFENSE TO THE ACTION.

The third requirement for relief from a default judgment is that the defendant set forth specific facts showing a meritorious defense to the plaintiff's claims. *State v. Musselman, supra*, 667 P.2d at 1057-58. The purpose of this requirement is "to prevent the necessity of judicial review of questions which, on the face of the pleadings, are frivolous." *Erickson v. Schenkers International Forwarders, Inc.*, 882 P.2d 1147, 1149 (Utah 1994). To be "meritorious," a defense need not be proven. "A defense is sufficiently meritorious to have a default judgment set aside if it is entitled to be tried." *Id.* at 1149. Whether a defense is meritorious is a question of law, reviewed for correctness. *Id.* at 1148. For example, in *Erickson*, the plaintiff alleged negligence and

breach of a shipping contract resulting in loss of the goods shipped. The court held that the defendant adequately asserted a meritorious defense by denying each basis for liability and asserting affirmative defenses. Because the defenses were not frivolous, they were entitled to be tried and justified relief from the default judgment. *Id.* at 1149.

In the present case, plaintiff seeks a refund of life insurance premiums under a so-called "10 day free look" provision, which allows the policyholder to return the policy for any reason "within ten days after its delivery." *See* U.C.A. § 31A-22-423. Plaintiff's complaint alleges that none of the policies was delivered (¶ 13, R. 3) and attaches a list of the policies issued by All American, with the names of individual insureds. Upon learning of the default judgment, All American responded with written receipts, signed by each of the insureds, acknowledging delivery of the policies between July 1991 and October 1993. (R. 117-37.) Accordingly, the All American policies were, in fact, delivered over *two years* before plaintiff filed its complaint, and the ten-day return privilege had long since expired. Therefore, plaintiff has no legal right to refund of the policy premiums under the statute relied upon. Moreover, plaintiff has conceded that the activities alleged against the Munyans "were neither condoned nor sanctioned by [All American]." (R. 13.) Therefore, All American cannot be liable for those activities. Plaintiff's claims, if any, should be pursued against the Munyans, who remain parties in the district court, not against All American.

In summary, the defenses raised by All American are meritorious because they are not frivolous and they are "entitled to be tried." *See Erickson, supra*, at 1149. In fact,

All American's defense to the claims is absolute. Therefore, the default judgment should be vacated to allow All American to assert its meritorious defense to the action.

POINT IV: THE DISTRICT COURT ERRED IN AWARDING PLAINTIFF ATTORNEY FEES WITHOUT A SHOWING OF ANY LEGAL BASIS FOR FEES.

In the default judgment, the district court awarded plaintiff $1,000 in attorney fees, plus an unknown amount of additional fees "expended in collecting" the judgment. (R. 42, Add. 5; see Affidavit of Fees and Costs, R. 31, Add. 6.) However, plaintiff demonstrated no legal basis for an award of attorney fees; therefore, the award must be reversed.

"Utah has consistently followed the well-established rule that attorney fees cannot be recovered unless provided for by contract or statute." *Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061, 1067 (Utah 1991). *See, e.g., Amica Mutual Ins. Co. v. Schettler*, 768 P.2d 950, 965 (Utah App. 1989) ("attorney fees are not recoverable in the absence of a contractual or statutory basis"). Moreover, "[a]ffidavits in support of an award of attorney fees must . . . set forth specifically the legal basis for the award." Rule 4-505(1), Code of Jud. Admin. *See Equitable Life & Casualty Ins. Co. v. Ross*, 849 P.2d 1187, 1194-95 (Utah App. 1993). Whether attorney fees are recoverable is a question of law, reviewed for correctness. *Valcarce v. Fitzgerald*, 331 U.A.R. 68, 72 (Utah 1997).

In this case, no contract or statute authorizes an award of attorney fees. Furthermore, plaintiff failed to set forth any legal basis for the award in the Affidavit of Fees and Costs, as required by Rule 4-505(1). (R. 31.) Accordingly, the district court

had no authority to grant an award of attorney fees in the default judgment, and the award must, therefore, be reversed.

CONCLUSION

Based on the foregoing, this Court should vacate the default judgment and remand the case to allow All American to answer the complaint and defend the action on the merits. Alternatively, the Court should reverse and remand for an evidentiary hearing on whether plaintiff properly served All American with notice of the action. In any event, the award of attorney fees should be reversed.

Respectfully submitted this 7th day of May, 1998.

KIRTON & McCONKIE

By: Merrill F. Nelson
Gregory M. Simonsen
Merrill F. Nelson
Attorneys for Defendant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **Brief of Appellant** to be mailed through United States mail, postage prepaid, this 7th day of May, 1998, to the following:

Chris L. Schmutz
265 East 100 South, Suite 300
Salt Lake City, UT 84111
Attorney for Plaintiff-Appellee

Merrill F. Nelson

ADDENDUM

Index

W:\7000\7235\0002\MfnAppellantBrf.wpd

Chris L. Schmutz
CHRIS L. SCHMUTZ, P.C.
265 East 100 South #300
Salt Lake City, UT 84111
(801) 364-0256

Attorney for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

CLASSIC CABINETS, INC., a Utah corporation, Plaintiff, vs. ALL AMERICAN LIFE INSURANCE COMPANY dba US LIFE, a New Jersey corporation, MIDLAND NATIONAL LIFE INSURANCE CO., a joint stock corporation, LIBERTY LIFE INSURANCE CO., a South Carolina corporation, LEON J. MUNYAN and KATHY L. MUNYAN dba MUNYAN & ASSOCIATES, Defendants.	ORDER DENYING ALL AMERICAN'S MOTION TO SET ASIDE DEFAULT JUDGMENT Civil No. 960900355 CV Judge Frank G. Noel

The Motion to Set Aside Default Judgment Against All American Life Insurance Company (hereinafter the "Motion") has been submitted to the Court for decision. The Motion was filed on or after September 8, 1997, and was accompanied by a Memorandum in Support of Motion to Set Aside Default Judgment Against All American Life Insurance Company, and the Affidavits of

J.W. Dewbre and Sandy Streeper. In response to the Motion, Plaintiff Classic Cabinets, Inc., filed a Memorandum in Opposition to Motion to Set Aside Default Judgment (hereinafter "Classic's Memorandum"), and the Affidavits of Silvan D. Warnick and Chris L. Schmutz. Thereafter, Defendant All American Life Insurance Company filed a Reply to Plaintiff's Memorandum in Opposition to Motion to Set Aside Default Judgment.

Neither party requested oral argument on the Motion, and no oral argument was presented to the Court.

The Court has carefully considered the Motion and all the foregoing memoranda and affidavits, as well as appropriate pleadings in the file, and the Court having fully reviewed the facts presented therein and the legal arguments of both parties, and the Court having determined, for the reasons stated in Classic's Memorandum, that the Motion should be denied, and other good cause appearing therefore, it is hereby

ORDERED that the Motion to Set Aside Default Judgment Against All American Life Insurance Company is hereby DENIED; and it is further

ORDERED under Rule 54(b) of the Utah Rules of Civil Procedure that there is no just reason for delay and the foregoing is a final and appealable order.

DATED this 17 day of November, 1997.

Frank G. Noe
Third District Judge

STATE OF UTAH
THIRD DISTRICT COURT
SALT LAKE

000002

230

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CLASSIC CABINETS, INC., a Utah corporation,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 960900355
vs.	:	
ALL AMERICAN LIFE INSURANCE COMPANY, dba US LIFE, a New Jersey corporation, et al.,	:	
Defendants.	:	

The Court has reviewed defendant All American Life Insurance Company's Motion to Set Aside the Default Judgment. For the reasons stated in plaintiff's Memorandum in Opposition to the Motion, the Court hereby denies the Motion to Set Aside the Default Judgment.

Counsel for plaintiff is to prepare an appropriate Order.

Dated this 24th day of October, 1997.

FRANK G. NOEL
DISTRICT COURT JUDGE

Chris L. Schmutz
CHRIS L. SCHMUTZ, P.C.
265 East 100 South #300
Salt Lake City, UT 84111
(801) 364-0256

Attorney for Plaintiff

JUDGEMENT

FEB 27 1996

B. Klein

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

CLASSIC CABINETS, INC., Plaintiff, vs. MIDLAND NATIONAL LIFE INSURANCE COMPANY, ALL AMERICAN LIFE INSURANCE COMPANY dba US LIFE, LIBERTY LIFE INSURANCE COMPANY, LEON J. MUNYAN and KATHY L. MUNYAN, Defendants.	220634 2-28-96 8:08 am DEFAULT JUDGMENT Civil No. 960900355 CV Judge Frank G. Noel

In the above-captioned action, Defendant All American Life Insurance Company dba US Life ("US Life"), having been personally served with summons and complaint in the manner prescribed by law, and having failed to appear and answer the Plaintiff's Complaint filed herein, and the time allowed by law for answering having expired, and the Default of the said Defendant having been duly entered; and the Court having received and fully considered Plaintiffs' Complaint, Motion for Default Judgment, Default, and all other pleadings and documents in the

file; and it appearing to the Court based upon the foregoing that Plaintiff is entitled to Default Judgment and that the amount of Plaintiff's damages is established by the foregoing pleadings and that there is no just reason for delay and that this Default Judgment should be a final and appealable judgment under Rule 54(b) of the Utah Rules of Civil Procedure; and good cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the judgment of this Court be awarded in favor of Plaintiff Classic Cabinets, Inc., and against Defendant All American Life Insurance Company dba US Life, in the sum of $77,522.12, plus pre-judgment interest in the amount of $13,566.42, together with attorneys fees and costs in the amount of $1,131.00, for a total judgment of $92,219.54, bearing interest at the statutory rate from the date of entry hereof; and it is further

ORDERED, ADJUDGED AND DECREED that this judgment shall be augmented in the amount of reasonable costs and attorney's fees expended in collecting said judgment by execution or otherwise as shall be established by affidavit; and it is further

ORDERED, ADJUDGED AND DECREED that there is no just reason for delay and this Default Judgment is expressly directed to be a final and appealable judgment within the meaning of Rule 54(b) of the Utah Rules of Civil Procedure.

DATED this 21st day of Feb., 1996.

Frank G. Noel
District Judge

Chris L. Schmutz
CHRIS L. SCHMUTZ, P.C.
265 East 100 South #300
Salt Lake City, UT 84111
(801) 364-0256

Attorney for Plaintiff

FEB 27 1996

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

JUDGEMENT

CLASSIC CABINETS, INC., Plaintiff, vs. MIDLAND NATIONAL LIFE INSURANCE COMPANY, ALL AMERICAN LIFE INSURANCE COMPANY dba US LIFE, LIBERTY LIFE INSURANCE COMPANY, LEON J. MUNYAN and KATHY L. MUNYAN, Defendants.	AFFIDAVIT OF FEES AND COSTS 220 6234 Civil No. 960900355 CV Judge Frank G. Noel

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE :

Chris L. Schmutz, being first duly sworn, deposes and states:

1. I am a member in good standing of the Utah Bar and am counsel for Plaintiff in the above-captioned case.

2. I have spent at least 10 hours in connection with pursuing the claims of Classic Cabinets which are set forth in the Complaint filed herein; including

investigation and research, preparation of complaint and summons, and preparation of default pleadings against All American Life Insurance Company dba US Life.

3. I have billed my time at the hourly rate of $100.00 per hour.

4. I believe the time and hourly rate to be reasonable in connection with a matter of this complexity, in the Salt Lake City area.

5. In addition to the fees incurred herein, Classic Cabinets has incurred the following costs: filing fee for complaint ($120.00), and service of process on All American Life Insurance Company dba US Life ($11.00).

DATED this 27th day of February, 1996.

Chris L. Schmutz
Attorney for Plaintiff

SUBSCRIBED AND SWORN TO before me this 27th day of February, 1996.

Notary Public
TERRI L. ARTERBURN
1025 South Lake Street
Salt Lake City, Utah 84105
My Commission Expires
August 23, 1998
State of Utah

Notary Public
Residing at: Salt Lake City, Utah

My Commission Expires:

August 23, 1998

000007

32

Gregory M. Simonsen (#4669)
Merrill F. Nelson (#3841)
KIRTON & McCONKIE
Attorneys for Defendant All American Life Insurance Company
60 East South Temple, Suite 1800
Salt Lake City, Utah 84111-1004
Telephone: (801) 328-3600

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

CLASSIC CABINETS, INC., a Utah corporation, Plaintiff, vs. ALL AMERICAN LIFE INSURANCE COMPANY dba US LIFE, a New Jersey corporation, MIDLAND NATIONAL LIFE INSURANCE CO., a joint stock corporation, LIBERTY LIFE INSURANCE CO., a South Carolina corporation, LEON J. MUNYAN and KATHY L. MUNYAN dba MUNYAN & ASSOCIATES, Defendants.	:	**ORDER OF STAY AND APPROVAL OF SUPERSEDEAS BOND** Civil No. 960900355 CV Judge Frank G. Noel

---

Based on the Stipulation for Stay Pending Appeal and Approval of Supersedeas Bond filed herein, it is hereby ordered that enforcement of the Order Denying All American's Motion

to Set Aside Default Judgment is stayed pending appeal, and the proposed supersedeas bond is approved. JAN 05 1998

DATED this _____ day of December, 1997.

BY THE COURT:

Frank G. Noel
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 1997, I caused a true and correct copy of the foregoing **Order of Stay and Approval of Supersedeas Bond** to be mailed through United States mail, postage prepaid, to the following:

Chris L. Schmutz
265 East 100 South, Suite 300
Salt Lake City, UT 84111

Attorney for Plaintiff

Connie Barney

W:\7000\7235\0002\MfnStaOr.pld

245

447 (Utah 1993); Putvin v. Thompson, 878 P.2d 1178 (Utah Ct. App. 1994); Ron Shepherd Ins. v. Shields, 882 P.2d 650 (Utah 1994); Commercial Inv. Corp. v. Siggard, 936 P.2d 1105 (Utah Ct. App. 1997); PDQ Lube Ctr., Inc. v. Huber, 329 Utah Adv. Rep. 20 (Utah Ct. App. 1997); PDQ Lube Ctr., Inc. v. Huber, 949 P.2d 792 (Utah Ct. App. 1997).

COLLATERAL REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d New Trial §§ 11 to 14, 29 et seq., 187 to 191.

C.J.S. — 66 C.J.S. New Trial §§ 13 et seq., 115, 116, 122 to 127.

A.L.R. — Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Propriety and prejudicial effect of suggestion or comments by judge as to compromise or settlement of civil case, 6 A.L.R.3d 1457.

Necessity and propriety of counter-affidavits in opposition to motion for new trial in civil case, 7 A.L.R.3d 1000.

Quotient verdicts, 8 A.L.R.3d 335.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Prejudicial effect of unauthorized view by jury in civil case of scene of accident or premises in question, 11 A.L.R.3d 918.

Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein, 15 A.L.R.3d 1101.

Absence of judge from courtroom during trial of civil case, 25 A.L.R.3d 637.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial, 64 A.L.R.3d 126.

Amendment, after expiration of time for filing motion for new trial, in civil case, of motion made in due time, 69 A.L.R.3d 845.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal, 38 A.L.R.4th 1170.

Jury trial waiver as binding on later state civil trial, 48 A.L.R.4th 747.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial, 57 A.L.R.4th 1049.

Propriety of limiting to issue of damages alone new trial granted on ground of inadequacy of damages — modern cases, 5 A.L.R.5th 875.

After-acquired evidence of employee's misconduct as barring or limiting recovery in action for wrongful discharge, 34 A.L.R.5th 699.

Excessiveness or adequacy of compensatory damages for personal injury to or death of seaman in actions under Jones Act (46 USCS Appx. § 688) or doctrine of unseaworthiness — modern cases, 96 A.L.R. Fed. 541.

Excessiveness or adequacy of awards of damages for personal injury or death in actions under Federal Employers' Liability Act (45 USCS §§ 51 et seq.) — modern cases, 97 A.L.R. Fed. 189.

Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3),not more than 3 months after the judgment, order, or proceeding

was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.
(Amended effective April 1, 1998.)

Advisory Committee Note. — The 1998 amendment eliminates as grounds for a motion the following: "(4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action." This basis for a motion is not found in the federal rule. The committee concluded the clause was ambiguous and possibly in conflict with rules permitting service by means other than personal service.

Amendment Notes. — The 1998 amendment deleted the former fourth ground for a motion in Subdivision (b), as described in the Advisory Committee Note above, and renumbered the grounds accordingly.

Compiler's Notes. — This rule is similar to Rule 60, F.R.C.P.

NOTES TO DECISIONS

"Any other reason justifying relief."

Subdivision (b)(7) embodies three requirements: First, that the reason be one other than those listed in Subdivisions (1) through (6); second, that the reason justify relief; and third, that the motion be made within a reasonable

time. Laub v. Sout
P.2d 1304 (Utah
Chipman & Sons,
1991).

Where a defenda
ment based on Sul
his motion for a ne
violated Rule 5(a)
providing defendar
thereby causing s
tiff's failure to pro
summary judgmen
latter claimed was
plaintiff's part, th
lieved in denying
fraud was not pres
ered a lapse in proc
Walker v. Carlson,
1987).

Defendant's clai
tered into an ill-a
fully understandin
rectly characterize
inadvertence, surp
vision (b)(1); becaus
Subdivision (b)(7) c
be used to circumv
period. Richins v. D
P.2d 382 (Utah Ct.

In an action aga
construction and m
the county was n
Subdivision (b)(7) b
ernmental immuni
Court decision spec
relied on by the cou
Hart v. Salt Lake Co
(Utah Ct. App. 1997

—Default judgme

It was not an abu
court to relieve a d
allow her to answer
she had mistakenly
protected by a divorc
decree required her
gation and defend
Harrison, 5 Utah 2d

Trial judge did no
ing to set aside defa
dant asserted that
was invalid and the
it. Board of Educ. v.
P.2d 806 (1963).

Where any reason
defaulting party, cou
granting relief from
it appears that to do
tial injustice to
Westinghouse Elec.
Larsen Contractor, 5

Subdivision (b)(7)
where defendant hus
default judgment of
its entry on the grou
incorrectly stated th
that he had not rece
divorce decree; theref
diction to disturb the
Kessimakis, 546 P.2d

Where defendant s

y the attorney of record of
ssignment of the judgment
executes such satisfaction
y of the judgment, in the
nstrument, duly acknowl-
r (2) by acknowledgment of
ıer or attorney and entered
n the county where first
ıd witnessed by the clerk.
judgment, or as to one or
all state the amount paid
lebtors, naming them.
court. When a judgment
satisfied of record, or when
ıave been lost, the court in
-ed may, upon motion and
attorney of the judgment
ıy enter an order declaring
sfaction to be entered upon

pt of a satisfaction of judg-
dged, the clerk shall file the
and enter it on the register
a brief statement of the
mount paid, on the margin
date of filing of such satis-

ıen a judgment shall have
rt, or as to any judgment
red upon the docket by the
extent of such satisfaction,
a lien. In case of partial
thereafter be issued on the
endorsed with a memoran-
nd shall direct the officer to
or to collect only from the
e thereon.
action in other counties.
ent shall have been entered
unty where such judgment
nscript of satisfaction, or a
ch satisfaction, may be filed
t in any other county where
keted. Thereupon a similar
all be made by the clerk of
ave the same effect as in the
ıally entered.

ents of judgment.
rovisions of Rule 61, a new
of the parties and on all or
following causes; provided,
new trial in an action tried
ıen the judgment if one has
stimony, amend findings of
ke new findings and conclu-
ew judgment:
eedings of the court, jury or
of the court, or abuse of
party was prevented from

r; and whenever any one or
n induced to assent to any
to a finding on any question
ırt, by resort to a determina-
of bribery, such misconduct
it of any one of the jurors.
which ordinary prudence
nst.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) **Time for motion.** A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) **Affidavits; time for filing.** When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On initiative of court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) **Motion to alter or amend a judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 60. Relief from judgment or order.

(a) **Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), (3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 61. Harmless error.

No error in either the admission or the exclusion
dence, and no error or defect in any ruling or orde
anything done or omitted by the court or by any of the pa
is ground for granting a new trial or otherwise disturb
judgment or order, unless refusal to take such action ap
to the court inconsistent with substantial justice. The co
every stage of the proceeding must disregard any err
defect in the proceeding which does not affect the substa
rights of the parties.

Rule 62. Stay of proceedings to enforce a judgme

(a) **Stay upon entry of judgment.** Execution or
proceedings to enforce a judgment may issue immed
upon the entry of the judgment, unless the court
discretion and on such conditions for the security o
adverse party as are proper, otherwise directs.

(b) **Stay on motion for new trial or for judgment.**
discretion and on such conditions for the security o
adverse party as are proper, the court may stay the exec
of, or any proceedings to enforce, a judgment pendin
disposition of a motion for a new trial or to alter or am
judgment made pursuant to Rule 59, or of a motion for
from a judgment or order made pursuant to Rule 60, o
motion for judgment in accordance with a motion for a dir
verdict made pursuant to Rule 50, or of a motion for ar
ment to the findings or for additional findings made pur
to Rule 52(b).

(c) ***Injunction pending appeal.*** When an appeal is
from an interlocutory or final judgment granting, disso
or denying an injunction, the court in its discretion
suspend, modify, restore, or grant an injunction durin
pendency of the appeal upon such conditions as it cons
proper for the security of the rights of the adverse part

(d) **Stay upon appeal.** When an appeal is take
appellant by giving a supersedeas bond may obtain a
unless such a stay is otherwise prohibited by law or
rules. The bond may be given at or after the time of filin
notice of appeal. The stay is effective when the supers
bond is approved by the court.

(e) **Stay in favor of the state, or agency thereof.**
an appeal is taken by the United States, the state of Ut
an officer or agency of either, or by direction of any depart
of either, and the operation or enforcement of the judgm
stayed, no bond, obligation, or other security shall be req
from the appellant.

(f) **Stay in quo warranto proceedings.** Where the d
dant is adjudged guilty of usurping, intruding into or u
fully holding public office, civil or military, within this
the execution of the judgment shall not be stayed d
appeal.

(g) **Power of appellate court not limited.** The provi
in this rule do not limit any power of an appellate court
a judge or justice thereof to stay proceedings or to sus
modify, restore, or grant an injunction, or extraordinary
or to make any order appropriate to preserve the status q
the effectiveness of the judgment subsequently to be ent

(h) **Stay of judgment upon multiple claims.** Wh
court has ordered a final judgment on some but not all
claims presented in the action under the conditions stat
Rule 54(b), the court may stay enforcement of that judg
until the entering of a subsequent judgment or judgment
may prescribe such conditions as are necessary to secur
benefit thereof to the party in whose favor the judgme
entered.

(i) **Form of supersedeas bond; deposit in lieu of b
waiver of bond; jurisdiction over sureties to be set f
in undertaking.**

(1) A supersedeas bond given under Subdivision (d
be either a commercial bond having a surety authoriz